NO. 45112-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DULATRE BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00451-8

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Jared B. Steed 1908 E Madison Street Seattle, WA 98122-2842 Email: steedj@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 6, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying the motion for a new trial when, although the bailiff's conduct in the trial below was clearly improper, the error was nevertheless harmless given the overwhelming evidence below and the fact that the photographs at issue were essentially cumulative and were not exculpatory in any way?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Joshua Dulatre Brown, was charged by an amended information filed in Kitsap County Superior Court with two counts of rape of a child in the third degree. CP 6. The second count also contained an aggravating circumstance that the offense resulted in the pregnancy of a child victim of rape. CP 7.

At trial, a jury found the Defendant guilty of the two charged offenses and found that the charge in Count II resulted in the pregnancy of the victim. CP 49-50. Prior to sentencing the Defendant filed a motion for a new trial pursuant to CrR 7.5. CP 51. The trial court, however, denied the motion, and at sentencing the trial court imposed a standard range sentence. CP 66; 70. This appeal followed.

B. FACTS

In September of 2011 the victim, A.B., was walking on Kitsap Way near a Taco Bell restaurant when the Defendant pulled up near her in a car and asked her where she was going. RP 150. Despite the fact that A.B. had never met the Defendant before, she got into the Defendant's car and they went to a nearby park where they talked and "hung out." RP 150-51. While at the park they talked about how old they were and A.B. told the Defendant she was 14 years old.[1] RP 151. The Defendant was 24. RP 151.[2]

The Defendant and A.B. stayed at the park and talked for approximately 20 to 30 minutes, and the Defendant then drove A.B. to her home where she lived with her father and step mother. RP 151-52. A day or two later the Defendant called A.B. and during the conversation A.B. invited the Defendant to come to her house. RP 152-53. A.B.'s father and step-mother were out of town in California at that time, and A.B. and her older brother and his fiancée were staying at the house. RP 152-53. The Defendant came to A.B.'s home and they talked and "hung out and watched a movie." RP 153-54.

Later that day, however, the Defendant and A.B. had unprotected sexual intercourse, and the Defendant spent the night at A.B.'s house and

[1] A.B.'s date of birth was November 7, 1996. RP 212.
[2] The Defendant's date of birth was January 24, 1987. RP 204.

slept in a bed with her. RP 154-55. The two had sexual intercourse a second time the following morning. RP 155. Afterwards, the Defendant told A.B. to "keep it on the low" which A.B. understood to mean that she was not to tell anyone about the encounter. RP 156. A day or two later the Defendant called A.B. and told her that his parents had found out about their relationship and that he couldn't talk to her anymore. RP 156.

Approximately six months later (when A.B. was 15 years old) the Defendant sent A.B. a text message and the two then began talking again. RP 156-57. On March 2, 2012, A.B. told her parents that she was going to spend the night at a friend's house. RP 160. Unbeknownst to her parents, however, A.B. and the Defendant had arranged to meet, and the Defendant picked A.B. up at a church near her home so that A.B.'s parents would not find out the truth. RP 158-59. After a brief stop at a store where the Defendant purchased some alcohol, the two drove to the Dunes Motel where they rented a room and spent the night together. RP 159. The Defendant had unprotected sexual intercourse with A.B. that night at the motel and had sexual intercourse with her again the next morning. RP 160.

The Defendant then drove A.B. back to the church near her home and dropped her off. RP 161. Several weeks later A.B. "felt like weird and stuff." RP 161. A.B. then took a pregnancy test which came back

positive. RP 161. A.B. then sent a text message to the Defendant and told him that she was pregnant, and the Defendant responded by telling her not to text or call him anymore. RP 161.

A.B. eventually told her sister that she was pregnant, and A.B.'s sister then informed her mother of this fact. RP 162. When A.B.'s mother found out she called A.B.'s father (both A.B.'s mother and father are now married to other people), and a group consisting of A.B's mother, step-father, father, and step-mother then got together to discuss the situation. RP 136. They decided to go to the Defendant's house as they did didn't know anything about him. RP 136. On March 20 the group of parents and step parents, as well as A.B., went to the Defendant's house to talk to him about the pregnancy. RP 136- 38.

After arriving at the Defendant's house, A.B.'s mother asked the Defendant what he had been thinking and if he knew A.B.'s age. RP 138. The Defendant, replied "Yes," and A.B.'s mother then asked him, "Well, how old is she?" in order to confirm that he really knew. RP 138. The Defendant responded, "Fifteen."[3] RP 138; 162. In response to A.B.'s mother's question about what he had been thinking, the Defendant stated that he wasn't thinking and that he got caught up in the heat of the moment. RP 139. A.B.'s mother also asked the Defendant if he was

[3] A.B. was in fact fifteen at this time. RP 138-39.

going to take care of the child and the Defendant indicated that he would be involved and he also offered to go with the family to a doctor's appointment that was scheduled for later that day. RP 139-40.

Law enforcement was notified of the situation, and an officer from the Bremerton Police Department responded to the Defendant's home, and the officer initially spoke with A.B.'s father and step-father. RP 72. The officer also spoke with the Defendant and confirmed his identity by examining his Washington State ID card. RP 75. The officer also made arrangements for A.B. to be interviewed later by a child interviewer at the prosecutor's office. RP 76-77, 81.

The officer did not arrest the Defendant, however, and the officer eventually left scene as there appeared to be no present hostility or anger between the parties. RP 75. The officer gave the parties a case number and informed them that the case would be assigned to a detective and that the detective would be in contact with them in the near future. RP 81.

Later that day A.B., her mother, step-mother, and the Defendant went to the doctor's appointment where the doctor confirmed that A.B. was pregnant. RP 140-41. At the doctor's office the Defendant acknowledged that he was the father. RP 141, 163.

A.B.'s eventually gave birth to a baby girl on November 17, 2012. RP 163. At trial, several pictures of A.B. as well as some pictures of her daughter were entered as exhibits. Exhibit 4, for instance, was a picture of the baby taken a month before trial, and this picture was published to the jury after it was admitted. RP 142-43, 164. Exhibit 5 was a picture of the child taken not long after she was born. RP 143. Exhibit 6 showed A.B. before she was pregnant and when she was approximately 14 or 15 years old. RP 143. Exhibit 8 showed A.B. when she was approximately 8 months pregnant. RP 142.

After the child was born, a Detective collected DNA swabs from A.B., her child, and from the Defendant. RP 94-95, 97-98, 169-70. A forensic scientist from the Washington State Patrol Crime Laboratory compared the DNA samples in order to test for paternity. RP 190-91. The testing revealed that there was a 99.9999988.43 percent probability that the Defendant was the father of the child. RP 196-97.

The Defendant did not testify at trial, and the defense called no witnesses whatsoever. In his brief closing argument, defense counsel argued that the State had the burden of proving every element beyond a reasonable doubt and outlined the elements of each offense. RP 228-29. With respect to the actual facts of the case, Defense counsel briefly questioned A.B.'s credibility, since she had "deceived" her mother about

the relationship the Defendant and lied about staying at a friend's house when she was in fact going to meet the Defendant. RP 230-31. Other than this brief argument, however, defense counsel did not directly contest any of the State's evidence or offer any specific reason the jury should decide that it had a reasonable doubt about the charges. RP 229-32. Not surprisingly, the jury found the Defendant guilty of the charged offenses. RP 239-41.

After the verdict was taken the jury was briefly sent back to the jury room, and the trial court encouraged the attorneys to speak with the jurors upon their release from service. RP 245. The trial court also explained to the attorneys that the court would bring the jury back in to dismiss them and the court would then leave room and allow the attorneys and the jurors to speak if they choose to do so. RP 245. Defense counsel thanked the court, but indicated he would leave without talking to the jury. RP 245-46. The prosecutor, however, apparently agreed to remain and speak with the jury. RP 246.

The following day the prosecutor filed an "Advisory Memorandum Re: Joshua Brown trial." CP 84-85. In it, the prosecutor provided the following information:

> After the jury was polled, Judge Dalton excused them while the parties completed the necessary post-conviction paperwork. Judge Dalton indicated that she intended on

> bringing the jurors back into the courtroom to thank them for their service and that both Mr. Thimons and I were welcome to stay, listen to her comments and chat with the jurors if they chose to stay. Mr. Thimons elected to leave and he excused himself. Judge Dalton brought the jurors back and thanked them for their service, provided them with information about the importance of jury service and shook their hands. She also told the jurors that they could stay and chat with the prosecution - advising them that it was helpful for lawyers to get feedback. All of the jurors remained in the courtroom and Judge Dalton excused herself. The only people left in the courtroom were the undersigned, all of the jurors and the bailiff.
>
> The jurors and I discussed various parts of the case. One of the jurors, I believe it was juror no. 9, indicated that they had not seen the pictures, except for one of the pictures of the baby that I published and one that they could see when the witness was identifying the exhibit. I asked the jurors whether they had looked at the pictures in the jury room. The jurors commented that they had not, because the bailiff told them they could not look at them. I turned to the bailiff and asked something akin to "What? You told the jurors they couldn't see them – [the courtroom clerk] gave them to you." The bailiff said something like, "I thought they weren't entered into evidence." I then turned to the jurors and asked whether anyone had seen the photos in the jury room. They said they had not. I was under the impression that they had the DNA samples and those were available for them to observe; just not the pictures. I looked around to see if the pictures were in the courtroom – but [the courtroom clerk] had already removed them.
>
> The State feels an obligation to disclose this information to the court and counsel.

CP 84-85. The Defendant then filed a motion arguing that he was entitled to a new trial because the bailiff had prevented the jury from examining the State's exhibits. CP 51-52, 61-62. The State filed a response arguing that a new trial was not warranted as the photographs were admitted by the

State and were essentially cumulative and of minor relevance. CP 56. In addition, the photographs certainly had no exculpatory value, and one photograph of the child was published to the jury during trial. The State noted that it had not been no disputed that the victim had been pregnant or that the baby had, in fact, been born. CP 56.

Two hearings were subsequently held on the Defendant's motion for a new trial. RP (6/10) 1-13; RP (6/14) 1-9. After hearing argument, the trial court took the matter under advisement. RP (6/14) 8. The trial court, however, did note that it appreciated the prosecutor's professionalism and integrity in bringing this matter to the court's attention, and the court also noted that the bailiff was undergoing retraining in order to prevent a recurrence of this issue. RP (6/10) 2, 12.

The trial court subsequently issued a "Memorandum Opinion" denying the motion for a new trial as the court determined that the error was harmless beyond a reasonable doubt. CP 66-68.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL BECAUSE, ALTHOUGH THE BAILIFF'S CONDUCT IN THE TRIAL BELOW WAS CLEARLY IMPROPER, THE ERROR WAS NEVERTHELESS HARMLESS GIVEN THE OVERWHELMING EVIDENCE BELOW AND THE FACT THAT THE PHOTOGRAPHS AT ISSUE WERE ESSENTIALLY CUMULATIVE AND WERE NOT EXCULPATORY IN ANY WAY.

The Defendant argues that the trail court abused its discretion in denying the motion for a new trial. App.'s Br. at 5. This claim is without merit because the record demonstrates that the bailiff's behavior below, while clearly improper, was harmless error in the preset case. The trial court, therefore, acted well within its discretion when it denied the motion for a new trial.

As a general rule, a trial court should not communicate with the jury in the absence of the defendant. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). The bailiff is in a sense the "alter-ego" of the judge, and is therefore bound by the same constraints. *See O'Brien v. City of Seattle,* 52 Wn.2d 543, 547–48, 327 P.2d 433 (1958). When an ex parte communication occurs, the trial court should promptly notify the parties, and determine whether a new trial is required. *Bourgeois*, 133 Wn.2d at 407. As the Defendant acknowledges, a trial court's denial of a new trial is

reviewed for an abuse of discretion. App.'s Br. at 5, c*iting State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); see also, *Bourgeois*, 133 Wn.2d at 406.

Although an improper communication between the court (including the bailiff) and the jury is an error of constitutional magnitude, a communication may be so inconsequential as to constitute harmless error. *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997); *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). As the Defendant further acknowledges, a harmless error analysis applies in cases involving an improper communication, and once a defendant raises the possibility that he or she was prejudiced by an improper communication between the court (or the bailiff) and the jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. App.'s Br. at 8, citing *Caliguri*, 99 Wn.2d at 509. "Nonetheless, the defendant must first raise at least the possibility of prejudice." *Caliguri*, 99 Wn.2d at 509.

In the present case, while there may have been some dispute regarding the timing of the improper communication between the bailiff and the jury, there is no question that the communication was inappropriate and improper. That is why the prosecutor immediately brought the matter to the court's attention. The question in the present

appeal is whether the trial court abused its discretion in denying the motion for a new trial.

The error in the present case, while serious, did not warrant a new trial for the simple reason that the error did not prejudice the Defendant. The photographs at issue were exhibits admitted by the State, not the defense, and there has not been (nor could there be) any claim that the photographs contained any exculpatory content whatsoever. Secondly, the photographs themselves were largely cumulative evidence that merely reinforced the undisputed fact that the victim had been impregnated and that she had given birth to a child. Witnesses testified to both of these facts and, more importantly, these facts were never contested in any way. The probative value of the pictures, therefore, was minimal and the exculpatory value of the pictures was simply nonexistent.

Given these facts the Defendant cannot show that he was prejudiced by the bailiff's comments and the jury's apparent belief that it could not examine the photographs.

In addition, the record as a whole clearly demonstrates that the error below was harmless because the evidence in the present case overwhelming. The victim provided undisputed testimony that she had had sexual intercourse with the Defendant. RP 154-55, 160. The undisputed evidence also established that the victim was impregnated and

that the Defendant acknowledged that he was the father. RP 140-41, 161, 163. DNA testing further established that there was a 99.9999988.43 percent probability that the Defendant was the father of the child. RP 196-97. The evidence was, in fact, so strong that defense counsel could not even formulate an argument as to why there was reasonable doubt. In short, the evidence was simply overwhelming.

Given these facts and the record as a whole, any error regarding the photographs of the victim and her daughter was so inconsequential that it constituted harmless error. *Bourgeois*, 133 Wn.2d at 407; *Caliguri*, 99 Wn.2d at 508. With respect to the ultimate result, it is clear that the error could not have affected the verdict and that any error was harmless beyond a reasonable doubt. *Caliguri*, 99 Wn.2d at 509. The Defendant, therefore, has failed to show that the trial court abused its discretion in denying the motion for a new trial.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 6, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

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